

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOLORES B. DONDORE, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
NGK METALS CORP., et al.	:	NO. 00-1966

YVONNE G. CONRAD, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
NGK METALS CORP., et al.	:	NO. 00-2441

MEMORANDUM

Bartle, J.

May , 2001

We have before us a motion by defendant Cabot Corporation ("Cabot") for "Reconsideration and/or Clarification of Obligations pursuant to the Court's April 9, 2001 Memorandum and Order."

In these two actions, which have been consolidated for purposes of discovery, plaintiffs contend that they suffered chronic beryllium disease as a result of defendants' negligent emission of beryllium dust, fumes, and particulate matter from their beryllium metal manufacturing facility near plaintiffs' homes in the Reading, Pennsylvania area.

In our Memorandum and Order of April 9, 2001, we held that Rule 4.2 of the Pennsylvania Rules of Professional Conduct, which has been adopted by this court, prohibits defense counsel

from ex parte interviews of certain persons who are putative class members in a related action. Rule 4.2 provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Pa. Rules Prof'l Conduct R. 4.2; E.D. Pa. R. Civ. P. 83.6, R. IV. The issue then before us involved whether Cabot's counsel may interview elderly neighbors of the plaintiffs concerning the plaintiffs' knowledge of their exposure to beryllium. Apparently the information was relevant to Cabot's statute of limitations defense. We explained that the neighbors were putative class members in a related action, Pohl v. NGK Metals Corp., July Term 2000, No. 733 (Ct. Com. Pl. Phila. County), and for purposes of Rule 4.2 were parties to that action and therefore were represented by counsel for the putative class. Consequently, the neighbors could not be interviewed without the consent of class action counsel. Dondore v. NGK Metals Corp., No. Civ. A. 00-1966, 2001 WL 360151, at *3 (E.D. Pa. Apr. 9, 2001). We further observed that defendants could depose the neighbors in accordance with the federal discovery rules and could interview them should the class action not be certified and should the asserted class members not otherwise be represented. Id.

Cabot's counsel has now raised several additional issues beyond the interviewing of the plaintiffs' neighbors. First, Cabot's counsel wishes to speak to a former management

employee who is a named defendant in a separate but similar individual negligence action involving beryllium emissions, Guldner v. Brush Wellman, Inc., No. 01-176 (E.D. Pa. filed Jan. 11, 2001), and who is also within the definition of a putative plaintiff class in still another related action. Baum v. NGK Metals Corp., No. 00-5595 (E.D. Pa. filed Nov. 3, 2000). Being a named defendant, in our view, trumps his status as an asserted plaintiff class member in a related action. Accordingly, Cabot's counsel is not prohibited by Rule 4.2 from speaking to and representing that person without the permission of counsel for the putative class members.

Cabot's counsel also seeks to speak to some of Cabot's former management employees who had worked at its beryllium facility in Reading. They are not named defendants anywhere but are putative class members in a related action instituted on behalf of employees and former employees of Cabot allegedly exposed to beryllium. Baum, No. 00-5595 (E.D. Pa.). Defendants contend they need to speak to such persons in order to prepare their defense in the two individual cases before us.

We recognize, as Cabot's counsel points out, the special relationship that exists between an organization and its current management employees. For example, under Rule 4.2 a plaintiff's counsel may not confer ex parte with a manager of a defendant corporation. See Univ. Patents, Inc. v. Khymer, 737 F. Supp. 325, 328 (E.D. Pa. 1990). However, we are not dealing here with current employees, but rather with former employees.

Whether the special relationship encompassed within Rule 4.2 extends to former management employees, who are not otherwise represented, is a more difficult question, but courts have generally held that the Rule does not prohibit such communications. See id. See also Action Air Freight, Inc. v. Pilot Air Freight, Corp., 769 F. Supp. 899, 902-04 (E.D. Pa. 1991).

In any event, we do not believe that a person foregoes the protections that putative class membership affords simply because he or she happens to be a former management employee of a defendant corporation. There is no basis under Rule 4.2 for allowing attorneys who represent adverse interests to interview a putative class member merely because of his or her position as a former employee unless that person is a named defendant in the same or a related action.

Unlike the more usual situation, of course, the members of the putative class action have not specifically engaged the lawyer representing them. Where compelling reasons exist to confer with a putative class member outside of formal discovery such as when the person is a former management employee, defense counsel may first seek the consent of putative class counsel. If consent is obtained, Rule 4.2 is satisfied. If consent is refused, our inquiry must focus on whether the person wishes to be represented by counsel for the putative class or to forego that status and speak to and aid the former employer. While we understand the desire of defense counsel to initiate discussions

with ex-management employees, no contact should be attempted without court approval, since defense counsel's unsupervised efforts could undermine the interests of those persons who are putative class members in the related class action litigation. Each potential witness needs to make an intelligent and voluntary decision, without any real or perceived pressure from a former employer's lawyers. The fair procedure, it seems to us, is for defense counsel to notify the court and all counsel in this action, as well as counsel for any relevant putative class, of the request for an interview. The court must then give counsel in all relevant actions the opportunity to be heard. If appropriate, the court may approve a neutral notice to the potential witness advising him or her of the nature of the pending action, his or her rights as a putative class member in related litigation, and of the request for an interview. It will then be up to the potential witness to decide, after having an opportunity to consult with separate counsel, whether or not to grant the ex parte interview and under what conditions. The goal of this procedure, we need to remember, is to protect the person's rights under Rule 4.2 of the Code of Professional Conduct to the protection and benefit of legal representation as a putative class member. If a former management employee knowingly and voluntarily gives up that protection and benefit, so be it.

Having conferred with all relevant counsel and being convinced that it is appropriate for defense counsel to seek the

aid of certain former management employees, we will issue the attached Order.

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ORDER

AND NOW, this day of May, 2001, after a conference with counsel for all interested parties, upon consideration of the motion of defendant Cabot Corporation for Reconsideration and/or Clarification of Obligations pursuant to the Court's April 9, 2001 Memorandum and Order, Dondore v. NGK Metals Corp., No. Civ. A. 00-1966, 2001 WL 360151 (E.D. Pa. Apr. 9, 2001), and for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that counsel for Cabot Corporation may contact only former management employees pursuant to the following procedure:

(1) counsel may send via first class mail to the last known address of the former management employee:

(a) two copies of the "Court Required Notice to Former Management Employees of Cabot Corporation and

its Predecessors Regarding Legal Rights in Pending Litigation" ("Notice") as set forth in Exhibit "A";

(b) a stamped envelope addressed to counsel for Cabot; and

(c) a transmittal letter requesting that the former employee read the Notice and return in the enclosed envelope a signed copy of the Notice indicating his or her decision regarding further communication;

(2) counsel for Cabot shall provide a copy of the Notice and the name and address of the addressee to counsel for plaintiffs in the above-captioned actions and counsel for the putative class of which the former management employee is a member;

(3) counsel for Cabot may request that the former management employee return a signed copy of the Notice indicating the former employee's election within ten (10) calendar days;

(a) if the former management employee elects not to speak with counsel for Cabot, counsel for Cabot shall refrain from any other ex parte communication with that former employee; and

(b) if the former management employee elects to speak with counsel for Cabot, counsel for Cabot may communicate freely with that former employee;

(4) counsel for Cabot shall provide copies of any Notice signed by the former management employee to counsel for

plaintiffs and to counsel of the putative class of which the former employee is a member;

(5) if counsel for Cabot has not received a signed copy of the Notice from the former management employee indicating his or her election after ten (10) calendar days, counsel for Cabot may contact that former employee by telephone and request only the following information:

(a) whether the former employee has received a copy of the Notice;

(b) whether the former employee has read and understood the Notice;

(c) whether the former employee has made an election;

(d) what course of action the former employee has elected or intends to elect;

(6) if, in the telephone communication described in paragraph 5, the former employee states a willingness to talk to Cabot's counsel, the former employee must execute the election form before any substantive discussions take place; and

(7) counsel for Cabot will provide to counsel for plaintiffs and to counsel of the putative class the date and approximate time of the above-described telephone communication with former management employees and a copy of any signed election form.

BY THE COURT:

J.

EXHIBIT A

Court Required Notice to Former Management Employees of Cabot Corporation and Its Predecessors Regarding Legal Rights in Pending Litigation

1. My name is _____, and I am a lawyer representing Cabot Corporation in pending litigation. I would like to speak with you about information you may have as a former management employee with Cabot. Before doing so, the Court has directed that I provide you with the following Notice because my interest in defending Cabot in numerous lawsuits may be against your interest as potential class members in one or more of those lawsuits.

2. As you may already know, Cabot Corporation and its predecessors, the Beryllium Corporation, Berylco, and Kawecki-Berylco, Inc., have been sued as defendants in several cases arising from their former beryllium manufacturing and processing facilities in Hazleton, Pennsylvania and outside Reading, Pennsylvania. Four of the cases were filed as class actions seeking to require Cabot to pay for voluntary medical testing for people who have been exposed to airborne beryllium, but who have not yet been diagnosed with a beryllium-related illness.

3. The proposed classes consist of (a) employees who worked at the Reading facility; (b) employees who worked at the Hazleton facility; (c) persons who lived within six (6)

miles of the Reading facility; and (d) persons who lived within six (6) miles of the Hazleton facility. The courts have not determined the merits of any of these class actions or decided whether the classes will be certified.

4. You may be a member of one or more of these proposed classes of plaintiffs. If you are, you have important legal rights that may be affected by my defense of Cabot Corporation.

5. Because my representation of Cabot may be adverse to your interests as a member of one or more of these classes, the Court has directed that I make this disclosure to you before you decide whether or not to speak with me. You have the following options:

- You may decide to speak with another attorney to learn more about your rights. This other attorney may be the counsel representing the proposed class of which you are potentially a member or another lawyer of your own choice.

Counsel for proposed plaintiff class consisting of employees who worked at the Hazleton facility and persons who lived within six (6) miles of the Hazleton facility:

Steve B. Jensen, Esq.
Baron & Budd, P.C.
3102 Oak Lawn Avenue
Suite 1101
Dallas, TX 75219
214-521-3605

John N. Zervanos, Esq.
Soloff & Zervanos, P.C.
1525 Locust Street
8th Floor
Philadelphia, PA 19102
215-732-2260

Counsel for proposed plaintiff class consisting of employees who worked at the Reading facility and persons who lived within six (6) miles of the Reading facility:

Ruben Honik, Esq.
Golomb & Honik, P.C.
121 South Broad Street
9th Floor
Philadelphia, PA 19107
215-985-9177

Howard Langer, Esq.
Sandals & Langer
One South Broad Street
Suite 1850
Philadelphia, PA 19107
215-825-4000

- You may decide to speak with me without consulting any other counsel. As noted on the cover letter, my name and address are:

[Insert Name]
Manko Gold & Katcher
401 City Avenue
Suite 500
Bala Cynwyd, PA 19004
610-660-5700

- You may decide not to speak with me at all.

6. Consider your choices carefully before making a decision as indicated below. Please check one.

- ☐ I am prepared to speak with you.
- ☐ I do not wish to speak with you.

7. Please sign and date the copy of this Notice on which you have indicated your decision.

8. Please mail the signed copy of the Notice in the stamped enveloped provided to you. You may keep a copy of the Notice for your own records. Please act promptly. If I do

not receive your signed response within ten (10) days, I may attempt to contact you by telephone.

I HAVE READ AND UNDERSTOOD THIS NOTICE AND HAVE MADE MY DECISION AS TO WHETHER OR NOT TO SPEAK TO YOU.

Signature

Date